No. 02-1609

Supreme Court, U.S.
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In The
Supreme Court of the United States

THE CITY OF LITTLETON,

Petitioner,

v.

ZJ GIFTS D-4, L.L.C., a Colorado Limited Liability Company d/b/a CHRISTAL'S,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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TABLE OF CONTENTS

	Page
Summary of Argument	1
Argument	2
I. Prompt Commencement of Judicial Review of A License Denial Made Under Narrow, Objective Standards Satisfies the First Amendment	2
A. ZJ Concedes That the Two Rationales Undergirding *Freedman's* Prompt Judicial Determination Requirement Do Not Apply to Littleton's Speech-Neutral Decisions to Grant or Deny a License	2
B. ZJ's Newly-Fashioned "Substantial or Significant" Argument is Unreviewable Here and Does Not Involve Unbridled Discretion to Deny a License	9
C. ZJ's "Content-Based" Argument is Irrelevant and Wrong	13
II. Legislative Mandate of Judicial Deadlines is Legally Impossible and Would Cause Substantial Harms Not Warranted by License Denials Under Narrow, Objective Standards	17
Conclusion	20

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Annex Books v. City of Indianapolis, 2003 U.S. Dist. Lexis 19878 (S.D. Ind. 2003) 7

California v. LaRue, 409 U.S. 109 (1972) 19

Cantwell v. Connecticut, 310 U.S. 296 (1940) 12

City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278 (2001) 19

City of Erie v. Pap's A.M., 529 U.S. 277 (2000) 15

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) 14, 15

City of Lakewood v. Plain Dealer Publishing, 486 U.S. 750 (1988) 5, 6, 11

City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) 13, 14, 16

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 4

Cox v. New Hampshire, 312 U.S. 569 (1941) 1, 7, 8, 12

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) 6

Freedman v. Maryland, 380 U.S. 51 (1965) ..... *passim*

FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990) 1, 3, 4

Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993).. 1, 5, 19

NCAA v. Smith, 525 U.S. 459 (1999) 11

Niemotko v. Maryland, 340 U.S. 268 (1951) 4

President, Directors & Co. of Bank of United States v. Dandridge, 25 U.S. 64 (1827) 9

TABLE OF AUTHORITIES – Continued

Page

Reich v. Collins, 513 U.S. 106 (1994) 19

Schlesinger v. Councilman, 420 U.S. 738 (1975) 9

Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) 11

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 3, 4

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) 10

Thomas v. Chicago Park District, 534 U.S. 316 (2002) ..... *passim*

U.S. v. Chemical Foundation, Inc., 272 U.S. 1 (1926) 2

Ward v. Love County, 253 U.S. 17 (1920) 19

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 15

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) 12, 16

STATE CASES

749 Broadway Realty Corporation v. Boyland, 1 Misc. 2d 575, 140 N.Y. Supp. 766 (N.Y Spc. Term 1955) 17

Alessi v. Municipal Court of Canon City, 38 Colo. App. 154, 556 P.2d 75 (1976) 17

City of Golden v. Simpson, 2004 Colo. Lexis 1 (Colo. 2004) 8

City of Colorado Springs v. 2354 Inc., 896 P.2d 272 (Colo. 1995) 2, 8, 9

Mai Lee Le v. City of Citrus Heights, 199 U.S. Dist. LEXIS 13477 (E.D. Cal. 1999) 17

TABLE OF AUTHORITIES – Continued

Page

Pleasures II Adult Video v. City of Sarasota, 833 So. 2d 185 (Fla. Ct. App. 2002) 7

Silver v. City of Omstead Falls, 20 Oh. App. 3d 361, 486 N.E.2d 852 (1984) 17

Williams v. People, 38 Colo. 497, 88 P.2d 463 (1907) 17

STATUTES AND COURT RULES

42 U.S.C. § 1988 9

Colo.R.Civ.P. 65 8

Colo.R.Civ.P. 106(a)(4) 8, 13

CONSTITUTIONS

Colo. Const. Art. VI 17

SUMMARY OF ARGUMENT

The narrow issue in this case concerns the judicial review appropriate for objective license denials made for the specific reasons and on the brief, fixed timetable in the Littleton Ordinance. *See* LCC § 3-14-8 (Br. App. 28a-30a). The case is not, as ZJ and its *amici* would have it, about the various constitutional challenges that can be brought against an adult business ordinance at any time in state or federal court. Thus, ZJ's claim about having to obtain a license–a claim that can be (and was) brought irrespective of a denial–is misplaced. See Section I.B., *infra* (addressing ZJ's "substantial or significant" vagueness argument). ZJ's failed argument on content-neutrality is equally irrelevant to the question presented, which centers not on the level of scrutiny applicable to Littleton's regulations, but on the review procedure appropriate for license denials under LCC § 3-14-8(A). See Section I.C., *infra*. Despite ZJ's and its *amici*'s constant focus on judicial review of *constitutional* questions, ministerial denials under LCC § 3-14-8(A) do not "involve the licensor in any decision-making of constitutional proportion." *Graff v. City of Chicago*, 9 F.3d 1309, 1331 (7th Cir. 1993) (en banc) (Flaum, J., concurring in judgment).

Rather, as the Court's cases demonstrate–from *Cox v. New Hampshire*, 312 U.S. 569 (1941), to *Freedman v. Maryland*, 380 U.S. 51 (1965), to *FW/PBS v. Dallas*, 493 U.S. 215 (1990), to *Thomas v. Chicago Park District*, 534 U.S. 316 (2002)–the central inquiry in this case is: (1) whether unbridled discretion exists in the timetable or grounds for denying a license, and (2) what judicial review is appropriate for that decision. The unifying theme of the Court's cases is that these two items are inextricably intertwined: the nature of judicial review required turns on the nature of the governmental decision under review. Thus, the critical fact in this case–as to which the parties and their *amici* agree–is that objective standards govern Littleton's time-limited decision to grant or deny a license, and none of those standards "has anything to do with what a speaker might say." *Thomas*, 534 U.S. at 322.

ZJ concedes this issue, but then ignores that *Freedman*'s prompt judicial determination requirement was specifically grounded in the content-based nature of the censor's decision and the concomitant risk of a "possibly erroneous denial of a license." *Freedman*, 380 U.S. at 59. Where, as here, none of the grounds for denying a license has anything to do with speech, ZJ's claimed risk of a wrongful denial is hyperbole concerning the City's inherent ability to abuse its power–in the words of the panel below, to "overstep the [non-discretionary] bounds of the ordinance." Pet. App. 31. This raw-abuse-of-power theory is as unsupported in the record as it is in the Court's cases. *U.S. v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (holding that courts will not presume malfeasance of public officials).

Nor has ZJ proffered a reason why immediate access to meaningful judicial review of a ministerial denial will not effectively safeguard its rights, especially where the review allows for expedited resolution and the Colorado Supreme Court has held that any wrongful denial–which would be obvious under the Ordinance's clear standards–will be "remedied promptly by judicial intervention." *City of Colorado Springs v. 2354 Inc.*, 896 P.2d 272, 284 (Colo. 1995).

ARGUMENT

I. Prompt Commencement of Judicial Review of A License Denial Made Under Narrow, Objective Standards Satisfies the First Amendment.

A. ZJ Concedes That The Two Rationales Undergirding *Freedman*'s Prompt Judicial Determination Requirement Do Not Apply to Littleton's Speech-Neutral Decisions to Grant or Deny a License.

ZJ does not answer the City's argument, Pet. Brf. 18-26, that the prompt judicial determination requirement stems directly from the judicial expertise necessary to draw "the line between legitimate and illegitimate

speech," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975), and the threat of self-censorship based on the "discouraging effect" of the censor's decision "that the film is unprotected." *Freedman*, 380 U.S. at 59. Noting these concerns, the *Freedman* Court stated: "*Therefore*, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Id.* (emphasis supplied). In this case, ZJ concedes that such concerns are not present because Littleton's "criteria for granting a license have been held to provide objective standards." Resp. Brf. 32.

Nor does ZJ deny that the *FW/PBS* plurality dealt squarely with both the judicial expertise and self-censorship concerns, *see* Pet. Brf. 22-26, and explicitly held that ministerial licensing "does not present the grave 'dangers of a censorship system.'" *FW/PBS*, 493 U.S. at 228 (quoting *Freedman*, 380 U.S. at 58). The plurality thus concluded that the city does not "bear the burden of going to court to effect the denial of a license" or "bear the burden of proof once in court." *FW/PBS*, 493 U.S. at 230 (plurality opinion); *see also id.* at 244-48 (White, J., concurring in part and dissenting in part); *id.* at 250 (Scalia, J., concurring in part and dissenting in part). The plurality, recognizing that the judicial deadline requirement rests on essentially the same premise as the requirement that the government bear the burden of initiating judicial proceedings, concluded that the First Amendment requires only that the government ensure the "availability" of "prompt judicial *review*," *id.* at 230, of ministerial decisions, rather than, as was required in *Freedman*, a "prompt judicial *determination*." 380 U.S. at 60.

In both *FW/PBS* and *Freedman*, the contours of the judicial review safeguard were animated by the relative risks that "the license [will be] erroneously denied." *FW/PBS*, 493 U.S. at 228; *Freedman*, 380 U.S. at 59. The *FW/PBS* Court recognized that ministerial licensing decisions, which are "not presumptively invalid," *FW/PBS*, 493 U.S. at 229, present a qualitatively different, and significantly lesser, risk of erroneous denial than do

censorship schemes. *Id.* at 228. ZJ now seeks to analytically divorce the judicial review safeguards from the respective risks for which they are designed, or in the alternative, equate the risk of improperly drawing "the line between legitimate and illegitimate speech," *Southeastern Promotions*, 420 U.S. at 559, with an alleged risk that city officials will intentionally deny a license even when clear standards require that it be granted. Such an unsubstantiated risk of "highly speculative injuries," *FW/PBS*, 493 U.S. at 248 (White, J., concurring in part and dissenting in part), does not justify imposition of a judicial deadline safeguard properly characterized by the Court as "extraordinary." *Thomas*, 534 U.S. at 323.

The cases cited in ZJ's discourse on prior restraint, Resp. Brief. 14-24, only support the City's central proposition that unbridled discretion–not the mere procedure of licensing–is the *sine qua non* of prior restraint. In *Southeastern Promotions*, the Court catalogued its prior restraint cases and stated: "In each of the cited cases, the prior restraint *was embedded in the licensing system itself, operating without acceptable standards.*" *Southeastern Promotions*, 420 U.S. at 553 (emphasis supplied). Similarly, in *Niemotko v. Maryland*, 340 U.S. 268, 273 (1951), the Court held that it is "*the lack of standards in the license-issuing 'practice' [which] renders that 'practice' a prior restraint.*" (emphasis supplied).

Thus, ZJ and its *amici* cannot claim that the mere existence of a licensing procedure makes Littleton's Ordinance a "prior restraint." This rhetorical assertion simply does not advance the analysis of the issues in this case. Labels are insufficient, as one Seventh Circuit judge has carefully observed:

> What distinguishes the Court's treatment of licensing schemes in these two sets of cases is the presence of unfettered discretion. In both *Cox* and *Clark* [*v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)], the Court dealt with the administration of an ordinance or regulation which proscribed the activity of the licensing authority. In fact, the *Cox* Court distinguished those

> cases in which government officials were unrestrained in their power to grant or deny permits. 312 U.S. at 577. In both *Lakewood* [*v. Plain Dealer Publishing*, 486 U.S. 750 (1988)] and *FW/PBS*, however, there was unfettered discretion to grant or deny a license–in *Lakewood* pursuant to the very language of the ordinance and in *FW/PBS* pursuant to the way the licensing official could delay the licensing decision, presumably indefinitely. . . . The concerns the Court voiced in both *Lakewood* and *FW/PBS* are not present here.

Graff, 9 F.3d at 1334-35 (Ripple, J., concurring).

Nor is there any merit in ZJ's claim that prompt access to an independent judicial officer to review a license denial is "meaningless" absent a mandated judicial deadline. Resp. Brf. 27. On the contrary, because Littleton's Ordinance provides objective standards, a quick exit from administrative proceedings, and a reviewable record that "allows courts quickly and easily to determine whether the licensor is discriminating against disfavored speech," *Lakewood*, 486 U.S. at 758, prompt judicial review is both "available" and meaningful.

A judicial deadline makes sense only if, as the Court has required in connection with censorship schemes, the judicial proceedings are initiated by the government and the private party is entitled to remain passive; the deadline then ensures that the government will expedite the review of its own presumptively-invalid decision. No such presumption of invalidity attaches to Littleton's objective decisions; indeed, absent unbridled discretion, the City is presumed to apply its ordinance properly, and the business, as plaintiff, can seek expedited review if it feels the City has not followed the objective standards of LCC § 3-14-8(A). But in this case, ZJ has proffered no evidence or legal argument to overcome that presumption.

ZJ's position is based on the erroneous assumption that *Freedman*'s judicial deadline requirement is driven by a need to control the courts. In fact, the deadline

requirement–like each of *Freedman*'s procedural requirements, *see* Pet. Brf. 20 n.11–responds to the central concern in the *Freedman* opinion, namely, that censors will be insufficiently concerned about First Amendment rights. Nothing in *Freedman* suggests that this Court lacks confidence in the ability of lower courts, including state courts, to adjudicate First Amendment claims. On the contrary, the basis of the *Freedman* approach is precisely that courts, not official censors, should make the inherently judicial decision "that [a] film is unprotected" by the First Amendment. *Id*. Such a concern is absent here.

Second, the argument ignores this Court's cases, in which normal judicial review has been deemed ineffective only for decisions infected with unbridled discretion: "[T]he absence of express standards makes it difficult [for courts] to distinguish, 'as applied,' between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power . . . [r]ender[ing] the licensor's action in large measure effectively unreviewable." *Lakewood*, 486 U.S. at 758-59; *see also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992) ("[The administrator] need not provide any explanation for his decision, and that decision is unreviewable").

On the other hand, judicial review of a license denial under LCC § 3-14-8(A) is meaningful, because Littleton's "[s]tandards provide the guideposts that check the licensor and *allow courts quickly and easily* to determine whether the licensor is discriminating against disfavored speech." *Lakewood*, 486 U.S. at 758 (emphasis supplied). LCC § 3-14-8(A) commits the City, ahead of time, to a limited list of reasons that can justify denial of an application. If an application satisfies these straightforward and easily-met criteria, the City will be unable to seize upon some extraneous fact and use that as a "*post hoc* rationalization," *id*., to justify a license denial. Thus, the Ordinance unquestionably gives a court a meaningful standard against which to judge the City's exercise of its limited discretion.

Indeed, lower courts–even those in circuits that do not require a firm judicial deadline–have insisted on a reviewable record as a condition of finding that meaningful judicial review has been provided to an adult business. *See, e.g., Annex Books v. City of Indianapolis*, 2003 U.S. Dist. Lexis 19878, at 5-6 (S.D. Ind. 2003) (following Seventh Circuit's decision in *Graff*, 9 F.3d 1309, and holding that "[o]ffering the right to request a hearing without including any of the procedural steps for exercising that right, including nothing regarding the creation of a reviewable record by a court, deprives the applicant of *meaningful* access to judicial review") (emphasis in original); *Pleasures II Adult Video v. City of Sarasota*, 833 So. 2d 185, 189 (Fla. Ct. App. 2002) (noting that because "certiorari is a record-based review procedure," a hearing is necessary for meaningful judicial review).

As the City has demonstrated, the analytical structure of *Thomas* fits the objective, time-limited[1] decisions under LCC § 3-14-8. *See* Pet. Brf. 33-36. Indeed, Littleton enjoys even less discretion than the Court has approved in *Thomas* and other licensing mechanisms for implementing time, place, and manner regulations. *Thomas*, 534 U.S. at 319 n.1 (allowing license denial if the activity is "inconsistent with the classifications and uses of the park" or if it "would present an unreasonable danger to the health or safety of the applicant, or other users of the park"). Similarly, the Court in *Cox*–upheld a state statute that prohibited any "parade or procession" on public streets without a license–ruling that the statute did not grant excessive discretion because the state supreme court required a license to be issued if "the convenience of the public in the

[1] ZJ mistakenly claims that a final administrative decision can take up to 90 days from the date of application. Resp. Brf. 28. ZJ's cites the current version of LCC § 3-14-8, but its time frames are incorrect. LCC § 3-14-8(C) ensures that the business will have its final administrative decision or a license within 40 days after application–2 days less than the time frame involved in *Thomas*. *Thomas*, 534 U.S. at 318-19.

use of the streets would not thereby be unduly disturbed." *Cox*, 312 U.S. at 576. In short, the standards upheld in *Cox* and in *Thomas* are far more discretionary than any in LCC § 3-14-8(A).

ZJ decries the time frames for proceeding under Colo.R.Civ.P. 106(a)(4), but this complaint stems from ZJ's continued conflation of decisionmaking of "constitutional proportion" with objective denials under LCC § 3-14-8(A). Judicial review for the latter situation is the only issue under review here because, as ZJ points out, judicial review of constitutional questions can be had any time.

Additionally, ZJ completely ignores the ability of the court to accelerate any action which in the discretion of the court requires acceleration. *Colorado Springs*, 896 P.2d at 284 (holding that Colo.R.Civ.P. 106(a)(4) makes prompt judicial review available by "establish[ing] procedures for both a stay of the effect of an adverse decision and expedited review thereof"). As a practical matter, unlike certiorari review of some fact-intensive, discretionary decisions (e.g., personnel appeals, rezoning requests, etc.) judicial review of a LCC § 3-14-8(A) denial would center on readily discernible facts (whether the applicant is 18, the corporation is in good standing, etc.) and improper denials would be obvious.

On expedited review, the business's simple complaint–setting forth the parties, the hearing officer's decision, and the claimed abuse of discretion–could be filed quickly, together with the necessary court order directing the City to submit the record shortly thereafter. Given the narrow grounds for a license denial, the record of the administrative hearing could be prepared within a few days, as could the City's essentially pro-forma answer denying an abuse of discretion. An accelerated briefing schedule, including simultaneous briefs or dispensing with briefs, could be easily accommodated because the crux of the matter is the objective fact that formed the basis of the denial.

Additionally, the applicant can seek interim relief pursuant to Colo.R.Civ.P. 65 to protect its rights pending final resolution. *City of Golden v. Simpson*, 2004 Colo.

Lexis 1, *25-26 (Colo. 2004). ZJ has presented no reason to conclude that the Colorado courts would not follow the Colorado Supreme Court's instruction that any unconstitutional restraint "be remedied promptly by judicial intervention." *Colorado Spring*, 896 P.2d at 284.

Moreover, an adult business that claims a denial is *unconstitutional* can always seek attorney's fees under 42 U.S.C. § 1988, as well as damages in the form of lost profits. The threat of having to pay these is deterrent enough to prevent the unsubstantiated risk that a city will violate the plain requirements of its ordinance.[2]

In essence, ZJ mischaracterizes the minimal risk at hand and seeks to justify an extraordinary remedy for that grossly misstated risk. ZJ's theory of the case not only assumes malfeasance by City officials, but also assumes that state courts will be dilatory in their correction of such obviously arbitrary and capricious acts. The opposite presumptions obtain. *President, Directors & Co. of Bank of United States v. Dandridge*, 25 U.S. 64, 69-70 (1827); *Schlesinger v. Councilman*, 420 U.S. 738, 756 (1975).

B. ZJ's Newly-Fashioned "Substantial or Significant" Argument is Unreviewable Here and Does Not Involve Unbridled Discretion to Deny a License.

Conceding that unbridled discretion in some form–either content-based censorship, amorphous standards for

[2] In contrast, the *FW/PBS* plurality specifically rejected the idea that a new adult business would be deterred by a ministerial denial. ZJ is silent on this issue, likely because it filed a preemptive suit to remain in an illegal location. ZJ's *amicus* First Amendment Lawyers Association ("FALA") actually hurts ZJ's position by demonstrating the significant investments and advanced planning necessary to start an adult business. FALA Brf. p. 16 (citing multi-million dollar adult businesses). With a quick administrative process and immediate access to judicial review, ZJ presents no reason why a decision cannot be obtained when a site for the business is identified, long before a scheduled opening.

license denials, or undue bureaucratic delay–is necessary for finding an unconstitutional prior restraint, ZJ returns to its recent, and only, claim of unbridled discretion: that the "substantial or significant" language in the definition of "adult bookstore, adult novelty store, or adult video store" gives Littleton officials discretion concerning whether the Ordinance, as a whole, applies to a given commercial enterprise. This argument, which is actually grounded in notice and due process concerns, is vital to ZJ's newly-minted theory of prior restraint, and appears under each of its three arguments for striking the Littleton Ordinance. *See, e.g.,* Resp. Brf. 27, 33, 45.

Contrary to ZJ's assertion, its "substantial or significant" theory of *prior restraint* was not raised below and is therefore unreviewable here. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). ZJ asserts that it previously raised what it broadly characterizes as "[t]he issue of improper discretion." Resp. Brf. 41. To be sure, ZJ raised (and prevailed on) its claims that unbridled discretion, in the form of potential indefinite delay, infected certain aspects of the prior version of the City's license application process. Brf. App. 26 n.14. But ZJ's citations to the record reveal no claim that the mere classification of a business as an "adult bookstore, adult novelty store, or adult video store" constitutes unbridled discretion amounting to an unconstitutional prior restraint under the First Amendment.[3]

[3] The cited pages of the complaint, R. 13-19, contain only one mention of "substantial or significant"—and that in the context of ZJ's due process claim. *See* R. 18-19 (references to the record refer to Appellant's Appendix filed in the Tenth Circuit). Similarly, the cited pages of ZJ's summary judgment motion, R. 395-397, fail to mention either the Ordinance's definition section in general or "substantial or significant" in particular. ZJ also cites a portion of its summary judgment brief, R. 411-419, but that discussion only supports the City's point that ZJ's "substantial or significant" argument was confined to the vagueness argument rejected by the lower courts. Finally, ZJ's opening brief in the Tenth Circuit is also unavailing. The cited pages of that document, pp. 26-28 and 44-53, are nearly verbatim repeats of ZJ's

(Continued on following page)

Moreover, it is telling that while ZJ claims to have raised this particular argument below, neither the District Court nor the Tenth Circuit mentioned it. It is well-settled that this Court will not pass upon an argument not addressed by the courts below. *NCAA v. Smith*, 525 U.S. 459, 470 (1999). This is true even when a party's brief in the court of appeals alludes to the theory it seeks to raise in this Court (which ZJ's does not). *Id.* at 470 n.6.

The record reveals that ZJ's "substantial or significant" argument was limited to its vagueness and overbreadth challenges that were rejected by the lower courts on both standing grounds and on the merits. Pet. App. 12-14 & n.6; *id.* at 47-55. Additionally, Littleton's sales tax license requirement—in—which ZJ couches its new "substantial or significant" argument–is not under review here. The Tenth Circuit held that "[because] this requirment is not specific to adult businesses it is irrelevant to the constitutionality of the licensing ordinance at issue in the present case." Pet. App. 21; *see also Lakewood*, 486 U.S. at 761. ZJ did not cross-petition for review of these rulings, and its recently-fashioned "substantial or significant" theory of prior restraint is not properly before the Court.

ZJ's expansive theory of prior restraint is also wrong as a matter of law. Simply put, it conflates the issue of whether a regulation *applies*, or constitutionally can apply, to a business–i.e., ZJ's failed vagueness and overbreadth challenges–with the essential element of a prior restraint: unbridled discretion "in deciding *whether or not to withhold a permit.*" *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150 (1969) (emphasis supplied).

summary judgment papers and are equally silent as to ZJ's argument that the mere definition of an "adult bookstore" is a prior restraint.

ZJ argues that this important distinction "has no substance," Resp. Brf. 38, but the distinction is critical: unbridled discretion to deny a license altogether effectuates the concern of *Freedman*–censorship. In contrast, the Littleton Ordinance mandates that even an entity stocking 100% sexually explicit material be given a license if it meets the objective standards of LCC § 3-14-8(A).

The Court's cases recognize the difference. For example, in *Cox*, 312 U.S. 569, the distance between marchers–and a corresponding question of whether the demonstrators' conduct constituted a "parade or procession"–was deemed "not material to the questions presented." *Id.* at 573; *see also Thomas*, 534 U.S. at 318 (ordinance regulating any "public assembly" or "parade" involving more than 50 people). In *Cox*, as here, the city's discretion to actually deny a permit was constrained by objective standards. The Court distinguished cases where unbridled discretion to define the activity constituted the power to deny a license and prohibit the activity altogether. *See Cox*, 312 U.S. at 578 (distinguishing *Cantwell v. Connecticut*, 310 U.S. 296 (1940), wherein the statute "authorized an official to determine whether the cause was a religious one and to refuse a permit if he determined it was not, thus establishing a censorship of religion").[4]

The fact that ZJ could have easily opened its adult bookstore at another location in the City is obscured by ZJ's misleading argument concerning the City's sales tax license requirement: "Thus, the discretionary decision of

[4] ZJ's argument is also directly contrary to *Young*, wherein the Court rejected the dissenters' argument that alleged vagueness in the definition of "adult theater" amounted to an unconstitutional prior restraint. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 84 (1976) (Stewart, J., dissenting); *id.* at 91 & n.4 (Blackmun, J., dissenting). The Court, noting that the City had no power to prohibit any message, held that "[t]he mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." *Young*, 427 U.S. at 62.

whether an applicant carries a substantial or significant amount of adult material will result in a denial of a sales tax license which in turn disqualifies the applicant from obtaining a license to present protected expression." Resp. Brf. 34-35. This inaccurate statement hides the fact that the only basis for denial of a sales tax license to an adult entertainment establishment is that the business is in an improper location. *See* LCC § 3-9-2-1, Reply Brf. App. 1 (stating that "the license shall be issued by the treasurer within five (5) days of application therefor, unless the adult entertainment establishment is in or proposed to be located in a location where such establishments are not permitted under this code"). ZJ's argument also ignores the fact that ZJ did not file its application for a sales tax license for more than seven months after it had opened for business and sued to have the City's zoning restrictions struck down.

A corollary to ZJ's "substantial or significant" argument is its risible claim that the determination that a business is an adult business "is essentially unreviewable." Resp. Brf. 38. When ZJ finally filed its sales tax license application, the City denied the license because ZJ was in an improper zone. ZJ could have obtained judicial review under Colo.R.Civ.P. 106(a)(4), but chose not to. However, ZJ obtained *immediate* access to judicial review of its vagueness claim in the District Court–though it never sought a temporary restraining order or preliminary injunction. This procedural history amply demonstrates that this case is not about judicial review of constitutional questions–which can be obtained at anytime–but about judicial review of specific license denials grounded in objective considerations.

C. ZJ's "Content-Based" Argument is Irrelevant and Wrong.

Ignoring the Court's cases that squarely address the content-neutrality of adult business regulations, *see, e.g., City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-49 (1986), ZJ points to two cases where the issue was not before

the Court to support its claim that Littleton's Ordinance should be treated as content-based. *See Thomas*, 534 U.S. at 323 n.2; *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). This contention, which was rejected below, fails because it is outside the scope of the question presented and is contrary to the Court's established precedents.

The question under review goes to the procedures appropriate for a denial of an adult business license–not the level of scrutiny applicable to the substantive provisions of the Littleton Ordinance. The district court, following this Court's precedents, flatly rejected ZJ's "content-based" argument. Pet. App. 57-59. The Tenth Circuit affirmed, stating: "We see nothing in either *Thomas* or *Alameda Books* that requires reconsideration of our conclusion as to the applicable standard of review." Pet. App. 33 n.15. ZJ did not petition for review of this determination, and it is not properly before the Court.

In any event, ZJ's argument finds no support in either *Thomas* or *Alameda Books*. *Thomas* expressly reserves the question concerning prompt judicial review for another day (this case). *Thomas*, 534 U.S. at 325. Interestingly, while ZJ and its *amici* seize upon one footnote in the opinion, they are content to ignore the entire analytical framework of *Thomas*. As the City's opening brief and this brief show, the *Thomas* framework is the most appropriate fit for licensing regulations that involve neither amorphous standards nor undue delay.

Nor does *Alameda Books* advance ZJ's argument. As the *Alameda* plurality properly observed, the case concerned only the substantial government interest prong of *Renton*, and the question of content-neutrality was not before the Court. *Alameda Books*, 535 U.S. at 441 (plurality opinion).

Additionally, while Justice Kennedy's concurrence noted that the "content neutral" label is "imprecise," *id.* at 444-45, the opinion also reiterated the secondary effects basis for regulating adult businesses and concluded that the "central holding of *Renton* is sound." *Id.* at 448 (Kennedy, J., concurring in judgment); *see also Renton*, 475 U.S. at 47 (noting imprecision of labels).

This is consistent with the Court's cases, which plainly teach that preventing secondary effects is an "undeniably important" government interest unrelated to the content of speech. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 291-95 (2000); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (holding that "[t]he government's purpose is the controlling consideration "in determining content-neutrality).

In this case, as in *Alameda Books*, the ordinance at issue "is not limited to expressive activities" because it "also extends, for example," to "sexual encounter centers," likely "to cause similar secondary effects." *Alameda Books*, 535 U.S. at 447 (Kennedy, J., concurring in judgment). Thus, the Ordinance "is not even directed to communicative activity as such," *Thomas*, 534 U.S. at 322, but at a category of commercial enterprises associated with secondary effects.[5] *See* LCC § 3-14-1 (explaining the city's interest in "reducing or eliminating the adverse secondary effects from such businesses" and that the ordinance has "neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials").

ZJ claims a different distinction by asserting that the Littleton Ordinance does not have a built-in secondary effects rationale, but this allegation is contrary to both the record and to common sense. First, the District Court specifically found that "Chapter 14 is narrowly tailored to serve a substantial government interest and leaves open ample alternative channels of communication," Pet. App. 60, and this conclusion was affirmed on appeal. Pet. App. 37-38 (concluding that "the ordinance meets the requirements of *Renton*"). Second, since the substantive provision of the

[5] That the City's regulation is directed only to the secondary effects of certain *businesses*, and not certain *speech*, is amplified by the fact that although other stores, including convenience stores, undoubtedly sell sexually explicit materials in the City, they are not associated with the adverse effects of adult bookstores specializing in hard-core fare, and thus are not regulated by the City's Ordinance.

Ordinance attacked by ZJ–zoning–advances important government interests, it is beyond cavil that a ministerial license procedure for ensuring adult businesses set up in proper locations is also sound. *Young*, 427 U.S. at 62. To hold otherwise would suggest that a city must wait until after a substantive violation has occurred before enforcing a constitutionally valid regulation, a proposition directly contrary to *Renton*. *Renton*, 475 U.S. at 52.

Most important, ZJ's "content-based" argument ignores more than two decades of this Court's jurisprudence–upon which hundreds of municipalities have relied in adopting adult business ordinances. Pet. Brf. 29-36; *Renton*, 475 U.S. at 54 (upholding ordinance as narrowly tailored because it was limited to "adult" theaters).

ZJ's answer to *Renton*'s narrow tailoring requirement, 475 U.S. at 54–by which Littleton's Ordinance must be limited to "adult" businesses–is unresponsive. Resp. Brf. 45. ZJ's simply refashions and repeats its "substantial or significant" vagueness claim and then argues that the Littleton Ordinance is overly broad, i.e., not narrowly tailored. *Id.* These previously rejected arguments, however, do not help ZJ overcome the Court's applicable precedents which, starting with *Young*, hold that properly drafted adult business ordinances are to be evaluated under the test for content-neutral time, place, and manner regulations.

Finally, it bears repeating, *see* Pet. Brf. 30, that since ZJ concedes that "[n]one of the grounds *for denying a permit* has anything to do with what a speaker might say," *Thomas*, 534 U.S. at 322 (emphasis supplied), it has no claim that the procedural question under review is affected by its failed argument against content-neutrality.

II. Legislative Mandate of Judicial Deadlines is Legally Impossible and Would Cause Substantial Harms Not Warranted by License Denials Under Narrow, Objective Standards.

ZJ claims that a "prompt, final judicial decision," *Freedman*, 380 U.S. at 59, is required for Littleton's non-discretionary license denials, but completely fails to address the City's argument that neither it, nor the Colorado legislature, have the ability under the Colorado Constitution to mandate judicial deadlines. Pet. Brf. 37-38; *Williams v. People*, 38 Colo. 497, 504-06, 88 P.2d 463, 465-66 (1907). While ZJ cites an Aurora Colorado ordinance that purports to mandate a prompt decision, Resp. Brf. 46-47, the ordinance is presumptively invalid. *Alessi v. Municipal Court of Canon City*, 38 Colo. App. 153, 154 556 P.2d 75, 88 (1976) (explaining that Colo. Const. Art. VI, § 21 vests the Colorado Supreme Court with the exclusive "power and obligation to promulgate rules governing the procedure in civil and criminal cases" and rules otherwise promulgated are invalid); *accord*, *749 Broadway Realty Corporation v. Boyland*, 1 Misc. 2d 575, 578, 140 N.Y. Supp. 766, 769 (N.Y. Spc. Term 1955); *Silver v. City of Omstead Falls*, 20 Oh. App. 3d 361, 362, 486 N.E.2d 852, 854 (1984). Similarly, while ZJ points to state legislation in other jurisdictions–which is irrelevant to this case–even the validity of that legislation is doubtful. *Mai Lee Le v. City of Citrus Heights*, 1999 U.S. Dist. LEXIS 13477, *23-24 (E.D. Cal. 1999).

Instead, ZJ–admitting that the City's view of Colorado law is correct–skips directly to its argument that cities, after denying a license on objective grounds,[6] should

[6] Adding to the confusion of the issues, *amicus* FALA submits non-record evidence to substantiate its alleged parade of horribles from the licensing of adult businesses. FALA Brf. 15-17, Appendix A, Appendix B. This extraneous non-record material should be stricken per Rule 32.3. Moreover, these observations are irrelevant to both the Littleton Ordinance and the issue in this case–which centers on the type of judicial review that

(Continued on following page)

nevertheless be required to give a license (i.e., a "provisional license") to that same business until the *business's lawsuit* is resolved. ZJ can provide no support for its sweeping view that the First Amendment provides a sexually oriented business the *per se* right to operate wherever and however it pleases until a court rules otherwise. Pet. Brf. 38-41.

Adopting ZJ's position that *municipal ordinances* must guarantee a judge's prompt decision would presumptively–and immediately–invalidate adult business ordinances across the country.[7]

ZJ's suggested remedy completely guts the ability of cities to regulate secondary effects through a reasonable, objective licensing procedure.[8] Under an ordinance like Littleton's, a City could be required to grant a license to,

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is necessary for license denials based on narrow, objective standards. As noted above, state and federal courts are always open–without an exhaustion requirement–to hear plenary challenges to ordinances on grounds of vagueness, overbreadth, or unbridled discretion.

[7] Counsel's informal review of municipal codes reveals that, in addition to the numerous Colorado ordinances mentioned previously, Pet. App. 136, at least 230 cities have licensing procedures for adult businesses that would be adversely affected by a mandate of judicial deadlining. Most of these adult business licensing ordinances provide review similar to that provided by Littleton; i.e., certiorari review or a similar statutory process for appealing administrative decisions. *See, e.g.*, City of Rochester (NY) Code § 98-19; Green Bay (WI) Code § 6.34(9)(f); Longview (TX) Code § 58-125; St. Paul (MN) Code § 18.03; Charleston (WV) § 18-387; Ann Arbor (MI) § 55.1X.5:102; St. Louis County (MO) Code § 821.100; Lawrence (KS) City Code § 6-308; Miami Springs (FL) Code § 132-15(A).

[8] The State of Ohio, on behalf of the *amici* States, has filed a motion to participate in oral argument based, in part, upon the desire to address the issue of provisional licenses. The City agrees that the interest of the States are significant in this case because an adverse ruling could have a troubling impact upon state courts and would undermine essential principles of federalism. However, the City believes that oral argument time should not be devoted to discussing the alleged remedy of a "provisional license." As the City has demonstrated, such a remedy is wholly unjustified.

for example, an applicant that is underage or that seeks to operate an adult business in an improper location, such as in the wrong zoning district or directly adjacent to a childcare facility, school, church, or another adult business. These outcomes–which, unlike the showing of a censored film, are clearly undesirable and potentially destructive–would be the unavoidable result if a deadline for final judicial decision were missed. Moreover, the City could be significantly hampered in enforcing a number of public health and safety regulations enforced through licensing. *See, e.g., City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 282 (2001) (noting sanctions against adult bookstore for "permitting minors to loiter on the premises, failing to maintain an unobstructed view of booths in the store, and allowing patrons to engage in sexual activity inside the booths"); *California v. LaRue*, 409 U.S. 109, 111 (1972) (describing lewd and unsanitary conduct in nude cabarets).

The proper remedy for any deficiencies in judicial review, if they exist, can be provided to a litigant who can show that those deficiencies have prejudiced it. The remedy should not be to grant relief to ZJ, who did not even invoke state court review, and who made no complaint about the federal court procedures it did invoke. In other cases in which the Court has concluded that state procedures were constitutionally inadequate, the relief has been to require state courts to provide adequate remedies to a party litigating in state courts–not to prevent the operation of a state or local regulatory program. *See, e.g., Reich v. Collins*, 513 U.S. 106 (1994); *Ward v. Love County*, 253 U.S. 17 (1920); *see also* Brief of *Amicus* Community Defense Counsel 9-13 (explaining that if judicial deadlines are required, the Court should announce a clear First Amendment rule that lower courts are constitutionally constrained to follow in deciding appeals of license denials).

In any event, there is no basis for radically expanding *Freedman*'s prompt judicial decision requirement to objective licensing decisions. *Graff*, 9 F.3d at 1331 (*en banc*) (Flaum, J., concurring) (explaining that expanding

Freedman's prompt judicial decision requirement to substantially dissimilar laws "would embark us on a senseless departure from the core logic undergirding the holdings in *Freedman* and its progeny"). As we have demonstrated, the standards in LCC § 3-14-8(A) "guide the official's decision and render it subject to effective judicial review," *Thomas*, 534 U.S. at 323, and ZJ's unsubstantiated risk of outright malfeasance is unrelated to the concerns that animate *Freedman*'s judicial deadline requirement.

CONCLUSION

For the foregoing reasons and those stated in the opening brief and the briefs of the City's *amici*, the decision of the court of appeals should be reversed.

March 1, 2004

Respectfully submitted,

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CITY OF LITTLETON, COLORADO

ORDINANCE NO. 4

Series of 2004

INTRODUCED BY COUNCILMEMBERS:
Conklin & Taylor

AN ORDINANCE OF THE CITY OF LITTLETON, COLORADO, AMENDING SECTIONS OF CHAPTER 9 OF TITLE 3 OF THE LITTLETON CITY CODE ENTITLED RETAIL SALES AND USE TAX.

WHEREAS, the City has recently made amendments to its Adult Entertainment Establishments Ordinance relating to various time limitations for licensing procedures relating to such establishments; and

WHEREAS, it is necessary to provide for conforming amendments to the City's Retail Sales And Use Tax Ordinance.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LITTLETON, COLORADO, THAT:

Section 1: Section 3-9-2-1 of the Littleton City Code is hereby amended to read:

> 3-9-2-1: LICENSE REQUIRED: It shall be unlawful for any person to engage in the business of selling at retail, as the same as defined in this chapter, without first having obtained a license therefore, which license shall be applied for in a form prepared by the city treasurer. No fees shall be charged for the issuance of the license, and it shall be issued by the treasurer, unless he OR SHE determines that the business to be operated would violate any of the statutes of the State of Colorado, of the United States or

any of the provisions of this code. ZONING APPROVAL SHALL BE REQUIRED FOR ALL SALES AND USE TAX LICENSES PROVIDED, HOWEVER, THAT IF THE PERSON OR ENTITY SEEKS A SALES AND USE TAX LICENSE FOR AN ADULT ENTERTAINMENT ESTABLISHMENT, THE LICENSE SHALL BE ISSUED BY THE TREASURER WITHIN FIVE (5) DAYS OF APPLICATION THEREFORE, UNLESS THE ADULT ENTERTAINMENT ESTABLISHMENT IS IN OR PROPOSED TO BE LOCATED IN A LOCATION WHERE SUCH ESTABLISHMENTS ARE NOT PERMITTED UNDER THIS CODE. ~~The~~ Said license shall be and remain in full force and effect until and unless revoked.

Section 2: Section 3-9-2-3 of the Littleton City Code, is hereby amended to read:

> 3-9-2-3: APPLICATION: The license required by Section 3-9-2-1 of this chapter shall be granted only upon application, stating the name and address of the person desiring such license, the name of such business and the location, including the street number of such business, and, FOR BUSINESSES OTHER THAN ADULT ENTERTAINMENT ESTABLISHMENTS, such other facts as may be reasonably required by the city treasurer.

Section 3: Severability. If any part, section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid, such invalidity shall not affect the validity of the remaining sections of this ordinance. The City Council hereby declares that it would have passed this ordinance, including each part, section, subsection, sentence, clause or phrase hereof, irrespective of the fact that one or more parts, sections, subsections, sentences, clauses or phrases may be declared invalid.

Section 4: Repealer. All ordinances or resolutions, or parts thereof, in conflict with this ordinance are hereby repealed, provided that this repealer shall not repeal the repealer clauses of such ordinance nor revive any ordinance thereby.

INTRODUCED AS A BILL at a regularly scheduled meeting of the City Council of the City of Littleton on the 6th day of January, 2004, passed on first reading by a vote of 7 FOR and 0 AGAINST; and ordered published in full in the Littleton Independent of January 8, 2004.

PUBLIC HEARING on the Ordinance to take place on the 20th day of January, 2004, in the Council Chambers, Littleton Center, 2255 West Berry Avenue, Littleton, Colorado, at the hour of 7:00 p.m., or as soon thereafter as it may be heard.

PASSED on second and final reading, following public hearing, by a vote of 7 FOR and 0 AGAINST on the 20th day of January, 2004 and ordered published by reference only in the Littleton Independent on the 22nd day of January, 2004

ATTEST:

/s/ Julie Bower
CITY CLERK

/s/ John K. Ostermiller
PRESIDENT OF CITY COUNCIL

APPROVED AS TO FORM:

/s/ Larry W. Berkowitz
CITY ATTORNEY